

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM GERRADE FRIDAY,

Defendant-Appellant.

UNPUBLISHED

December 1, 1998

No. 202469

Kent Circuit Court

LC No. 96-005769 FH

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

The jury convicted defendant of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to twenty-two to forty years' imprisonment. Defendant appeals as of right. We affirm.

First, defendant argues the trial court erred in denying his motions for a mistrial. This Court reviews a trial court's grant or denial of a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant claims the trial court should have granted a mistrial because the prosecutor elicited testimony from Wayne Lee Mansfield that he had previously purchased drugs from defendant, because Mansfield gave unresponsive answers during cross-examination that indicated he had purchased drugs from defendant on ten previous occasions, and because police officers testified they had defendant under surveillance. None of these alleged errors rose to the level of depriving defendant a fair and impartial trial. Accordingly, we find the trial court did not abuse its discretion in denying defendant's motions. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

Next, defendant asserts the trial court erred by supplying the jury with only part of the transcripts the jury requested during deliberations. We review the trial court's decision whether to grant the jury's request for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

The jury requested a transcript of the testimony of Detective Gomez and Trooper Mainprize which related to the officers' "positive identification of William Friday at the scene." The trial court provided the jury with a transcript of Detective Gomez' testimony, which it believed fully satisfied the jury's request. Moreover, the trial court's remarks clearly conveyed to the jury that any future requests to review testimony or evidence would be granted. Accordingly, the trial court did not abuse its discretion by refusing to provide the jury with a transcript of Trooper Mainprize's testimony. *People v Robbins*, 132 Mich App 616, 620-621; 347 NW2d 765 (1984).

Next, defendant argues the prosecutor's failure to provide the original tape recording of a conversation that occurred during the drug deal between defendant and Mansfield until midway through trial unfairly prejudiced him. Defendant also claims he was denied a fair trial when the trial court allowed the prosecution to play the original tape during Trooper Evans' testimony despite the fact that the jury heard a copy of the tape during Mansfield's testimony earlier in the trial. This Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

In support of his claim that his conviction should be reversed because of the prosecutor's failure to disclose the original tape, defendant relies primarily on *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980) and *People v Taylor*, 159 Mich App 468; 406 NW2d 859 (1987). The cases defendant cites are inapposite. In this case, the prosecution did not withhold information from defendant. Before trial, the prosecutor provided defense counsel with a copy of the original tape and defense counsel could have listened to the original at the prosecutor's office before trial. The prosecutor was not required to give defendant the original micro-cassette tape. Moreover, defendant has not cited any authority supporting his position that it was improper for the prosecutor to play both the copy and the original tape at trial. Accordingly, he has abandoned this issue on appeal. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, although defendant asserts that he prepared his defense based on the copy of the tape, he has not explained how the original differed from the copy, resulting in prejudice to him.

Next, defendant argues that he was denied his right to due process during the sentencing hearing. We disagree.

The trial court granted the prosecution's request to hold a sentencing hearing at which police officers testified, among other things, that Michael Stokes told them defendant was involved in a homicide.¹ Defendant claims he was denied due process because the trial court denied his request (1) to subpoena Stokes, (2) for a copy of the police notes of interviews with Stokes, and (3) for the results of polygraph tests taken during those interviews. Defendant's argument is without merit. The trial court stated on the record that it was not considering defendant's involvement in any homicide and commented on the seriousness of the charge defendant was convicted of in this case. Defendant must be given an opportunity to refute information relied on at sentencing. *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995). However, because the trial court did not rely on the disputed information from Stokes, we need not decide whether defendant was afforded a sufficient opportunity to refute it.

Defendant also challenges his sentence claiming it violates the principle of proportionality. This Court reviews sentences imposed on habitual offenders for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). We find the trial court did not abuse its discretion in sentencing defendant, especially in light of the fact that defendant had two prior felony convictions, one prior misdemeanor conviction, a juvenile record, pending charges in the 17th Circuit Court for possession with intent to distribute marijuana, felonious assault, and being a felon in possession of a firearm, and was on probation for assaulting his girlfriend at the time of the instant offense.

Defendant also argues his sentence is disproportionate because his maximum sentence is almost double his minimum sentence, relying on *People v Wright*, 432 Mich 84; 437 NW2d 603 (1989) and *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Defendant misapprehends the rule of these cases. The purpose of the *Tanner* rule, which was applied to habitual offender's sentences in *Wright, supra*, is to allow a sufficient interval between the minimum and maximum sentences so that the sentence imposed is an indeterminate sentence. *Wright, supra* at 89-90, quoting *Tanner, supra* at 689-690. In order to comply with the indeterminate sentence act, a minimum sentence must not be greater than two-thirds of the maximum sentence. *Wright, supra* at 85-86; *Tanner, supra* at 690. Defendant's sentence complies with this rule.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Henry William Saad

¹ Defendant was charged for his alleged involvement in the homicide, but a magistrate found there was insufficient evidence presented at the preliminary examination to bind defendant over.